

# **EXHIBIT 6**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

4 SIA HENRY, et al., ) Docket No. 22 C 125  
5 Plaintiffs, )  
6 vs. )  
7 BROWN UNIVERSITY, et al., ) Chicago, Illinois  
8 Defendants. ) February 23, 2023  
9 9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MATTHEW F. KENNELLY

## APPFARANCES:

13 For the Plaintiffs: GILBERT LITIGATORS & COUNSELORS  
14 BY: MR. ROBERT DEWITT GILBERT  
15 11 Broadway, Suite 615  
New York, NY 10004  
(646) 448-5269

22 Court Reporter: MS. CAROLYN R. COX, CSR, RPR, CRR, FCRR  
23 Official Court Reporter  
24 219 S. Dearborn Street, Suite 2102  
Chicago, IL 60604  
(312) 435-5639

## 1 APPEARANCES CONTINUED:

2 For the Defendants:

3 Brown University: MORGAN, LEWIS & BOCKIUS LLP  
4 BY: MR. JON R. ROELLKE  
5 1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
(202) 739-57546  
7 University of  
8 Chicago: ARNOLD & PORTER  
9 BY: MR. JAMES L. COOPER  
MR. MICHAEL RUBIN  
555 Twelfth Street, N.W.  
Washington, DC 20004-1202  
(202) 942-500011  
12 Columbia University: SKADDEN ARPS SLATE MEAGHER & FLOM, LLP CH  
13 BY: MS. AMY VAN GELDER  
14 155 North Wacker Drive, Suite 2700  
Chicago, IL 60606-1720  
(312) 407-090315  
16 Cornell University: KING & SPALDING  
17 BY: MR. ZACHARY THOMAS FARDON  
18 110 North Wacker Drive, Suite 3800  
Chicago, IL 60606  
(312) 995-633319  
20 Dartmouth College: JENNER & BLOCK LLP  
21 BY: MR. DOUGLAS LITVACK  
353 N. Clark Street  
Chicago, IL 60654  
(312) 222-935023  
24  
25

## 1 APPEARANCES CONTINUED:

2 Duke University: GIBSON, DUNN & CRUTCHER LLP  
3 BY: MR. CHRISTOPHER DEAN DUSSEAU  
4 333 South Grand Avenue  
Los Angeles, CA 90071  
(213) 229-7855

6 SAUL EWING ARNSTEIN & LEHR LLP  
7 BY: MR. JAMES A. MORSCH  
161 North Clark Street, Suite 4200  
8 Chicago, IL 60601  
(312) 876-7100

10 Georgetown  
11 University: MAYER BROWN LLP  
12 BY: MS. BRITT MARIE MILLER  
MS. JESSICA MAURER  
13 71 South Wacker Drive  
Chicago, IL 60606  
(312) 782-0600

15 MIT: FRESHFIELDS  
16 BY: MR. JAN RYBNICEK  
700 13th Street, NW  
17 10th Floor  
Washington, DC 20005-3960  
18 (202) 777-4500

19  
20 Northwestern  
21 University: GASS TUREK  
22 BY: MR. SCOTT DAVID STEIN  
241 N. Broadway, Ste 300  
Milwaukee, WI 53202  
(312) 853-7000

## 1 APPEARANCES CONTINUED:

2

3 Vanderbilt  
University:4 WHITE & CASE LLP  
BY: MR. DAVID H. SUGGS  
1221 Avenue of the Americas  
New York, NY 10020  
5 (212) 819-8200

6

7 Yale University:

8 HOGAN LOVELLS US LLP  
BY: MR. CHARLES A. LOUGHLIN  
MR. BENJAMIN F. HOLT  
555 Thirteenth Street, NW  
9 Washington, DC 20004  
10 (202) 637-5661

11

12

13

14

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1           (The following proceedings were had by video:)

2           THE COURT: This is Judge Kennelly. It's a video  
3 hearing.

4           I think defense counsel sent a list of appearances to  
5 my courtroom deputy clerk, so we don't need to go through  
6 that.

7           I don't know if the same was done on the plaintiffs'  
8 side or not, but do plaintiffs' counsel -- does anybody want  
9 to put your names on the record at this point?

10          You're muted.

11          MR. GILBERT: Robert D. Gilbert.

12          THE COURT: You're not muted, but you got to crank  
13 your volume up. I'm barely hearing you.

14          MR. GILBERT: This is Robert D. Gilbert.

15          Is that better, your Honor?

16          THE COURT: That's way better. Thanks.

17          MR. GILBERT: Okay. Gilbert Litigators & Counselors  
18 on behalf of the plaintiffs.

19          THE COURT: All right. So I set this because of the  
20 motion that I got from the plaintiffs asking for a hearing on  
21 what were represented to be three issues. The three issues  
22 are the issue about custodians and the president's office and  
23 development office; the second was -- has to do with TAR,  
24 which is -- for the benefit of the court reporter, is T-A-R,  
25 all capitals; and the third has to do with production dates.

1           So the first of those, I think I can take care of  
2 pretty quickly.

3           I'm not sure who that was. But if you're not  
4 talking, please mute yourself. Thanks.

5           The first of those, I can take care of pretty  
6 quickly. I dealt with it in our hearing on February the 8th.  
7 I don't know that anybody's ordered the transcript yet, but  
8 I'm looking at the rough transcript. And the rough  
9 transcript, it's at page 61. I don't know if that will  
10 translate into the same page as when you get to the official  
11 version or not, but here's what it says. This was after a  
12 discussion about depositions of certain presidents or former  
13 presidents who had allegedly made public comments.

14           Here's what I said:

15           As far as adding the development and president's  
16 office as custodians, I'm putting the pause on that for now.  
17 We're going to readdress that in a couple of months, once  
18 stuff is actually getting produced. I have to get this thing  
19 off the dime, so we're going to put the pause on having  
20 custodians from the development and president's office right  
21 now.

22           Here's what that means for the defendants. So I want  
23 to make real clear what that means for the defendants. What  
24 it means is that if I later determine there is a basis to  
25 include those for some or all of the defendants, you're not

1 going to get a whole lot of time to produce the stuff, and  
2 you're not going to get to do it at anybody's leisure; it's  
3 going to be my definition of when you get it done.

4 So as far as I'm concerned, that issue's off the  
5 table. For now, we're presumably going to revisit it at some  
6 point in time, but I don't really see a basis for -- at this  
7 point, for further discussion about that, so what I intend to  
8 do is move on to the other two.

9 And the defendants are telling me they're not ripe.  
10 And I get what you're saying, that you're still talking about  
11 this, but I need to say this:

12 We've got to -- there's a deadline that's in place;  
13 it's less than two weeks from now. In fact, it's only barely  
14 more than a week from now regarding substantial completion of  
15 production, and to some extent, we're still talking about the  
16 shape of the table here, and that's not a good thing, and so  
17 we are going to talk about these things today. And if that  
18 means that -- you know, that you're not going to have, you  
19 know, three more four-hour meet and confers with the other  
20 side, then, okay, we're just putting the fast-forward button  
21 on.

22 So let's talk, first, about the TAR issue. Who wants  
23 to talk -- I've got the plaintiffs' position and the thing  
24 that was filed on the -- back on -- well, I guess, the more  
25 recent thing that was filed just the other day.

1           So can the defendants kind of talk to me about that,  
2 whoever is going to deal with it?

3           MS. MAURER: Yes, your Honor, this is Jessica Maurer,  
4 on behalf of Georgetown, for the defendants.

5           Our position is that the appropriate standard to  
6 apply in assessing the defendants' TAR process is reasonable  
7 and proportional. The weight of the authority, both case law  
8 and Sedona Principle 6, supports our position that search  
9 terms are an appropriate tool to use to pre-cull the document  
10 population before implementing a TAR workflow. I'm happy to  
11 provide you with some case citations, if that would be  
12 helpful.

13           Plaintiffs' approach would significantly increase the  
14 burden on TAR defendants by requiring us to add potentially  
15 millions of documents into our review queue that are likely  
16 not relevant because they're not hitting on an extensive list  
17 of search terms that the parties have negotiated specifically  
18 to identify responsive documents.

19           THE COURT: Can you just -- I get that that's -- can  
20 you explain to me how you get there? So why is it that the  
21 plaintiffs' approach is going to -- would end up adding all of  
22 these extra documents?

23           MS. MAURER: Yes, your Honor. So it's impossible to  
24 tell you exactly how many documents we're going to have to  
25 review, but our e-discovery experts suggest that it's

1 reasonable to expect to review about 75 percent of the  
2 document population in a TAR review. So if we have 4 million  
3 documents, 75 percent of that is a lot higher than if we're  
4 talking about 750,000 documents.

5 THE COURT: Okay. I guess my question was why is --  
6 and maybe this is just a fairly overt display of my ignorance  
7 here, but why is it that the plaintiffs' approach is going to  
8 make you look at more things?

9 MS. MAURER: It's simply the number of documents that  
10 you're adding into the review queue on the whole, on the  
11 total. So our approach would be to, first, cull our  
12 collection using search terms that the parties have agreed  
13 upon. And speaking for Georgetown, that population would be  
14 about 640,000 documents. From there, we would implement our  
15 TAR workflow, and our e-discovery vendors would expect that we  
16 would look at about 75 percent of those documents.

17 Using the plaintiffs' approach --

18 THE COURT: What you're talking about right -- what  
19 you're talking about right now seems to me to -- and I'm -- I  
20 know -- of all of the people on this call, I know the least  
21 about this, okay?

22 So what you're talking about right now seems to me to  
23 be what Mr. Gilbert's part of the status report filed on  
24 February 10th calls the second area. The second area concerns  
25 the use of applying search terms before applying TAR methods.

1       The parties disagree over whether it's appropriate to use  
2 search terms, dot, dot, dot, to pre-cull defendants' documents  
3 prior to applying TAR methods. That's what I think you were  
4 just talking about; is that right?

5           MS. MAURER: Yes, your Honor.

6           THE COURT: The other issue -- I think I get your  
7 position on that.

8           The other issue, what he calls the first area, is  
9 what's called the target recall rate.

10          MS. MAURER: Yes, your Honor.

11          THE COURT: And so it's a question of setting a  
12 percentage, I guess.

13          MS. MAURER: So the recall rate is essentially the  
14 number of responsive documents from your entire population  
15 that you have actually identified. So defendants suggest that  
16 a target recovery of about 70 percent is a reasonable and  
17 proportionate rate. This is just a target, right? So the  
18 defendants may actually exceed 70 percent recall. In some  
19 interim testing that some defendants have done suggest that  
20 they will exceed 70 percent by a significant margin.

21          So we're talking right now about a target.

22          70 percent -- it's our position that 70 percent recall has  
23 been recognized in prior cases as reasonable. So, for  
24 instance, in *Broiler Chicken*, the special master said that 70  
25 to 80 percent range was reasonable and noted that a higher or

1 even lower percentage could be reasonable depending on the  
2 types of documents that you're finding during your testing at  
3 the end.

4 So, you know, it's our position that a target of  
5 70 percent is reasonable.

6 THE COURT: And so what we're talking about here when  
7 we're talking about the percentage, this is the -- this is  
8 when you're basically training the system; is that right?

9 MS. MAURER: This is actually at the end of the  
10 reviews.

11 THE COURT: The end of the reviews. Okay.

12 MS. MAURER: Yeah. This is actually at the end of  
13 the reviews. So it's a -- how many responsive documents out  
14 of the total population of responsive documents did you find,  
15 so our position is that 70 out of 100 is reasonable.

16 THE COURT: Okay. I get you. If I can translate  
17 that into 1980s terms, if you don't mind.

18 So what that means is that -- is that if there were  
19 100 responsive documents out there, 70 percent means the  
20 search method is going to get 70 of them.

21 MS. MAURER: Correct, your Honor.

22 THE COURT: And the plaintiffs are going to get 85.

23 MS. MAURER: Well, that's the target.

24 And I would like to add that if we're comparing this  
25 to a linear review -- so a review where you're looking at

1 every single document, studies have suggested that, you know,  
2 an average recall for that type of review is about 60 percent.  
3 And there's no reason to hold TAR to a higher standard than a  
4 linear review, where you're looking at every single document.

5 THE COURT: So can I just ask, to make sure I'm  
6 translating what you just said right, when you say --

7 MS. MAURER: I apologize.

8 THE COURT: -- when you say "linear review," does  
9 that mean somebody paging through a paper file?

10 MS. MAURER: That means somebody looking -- so  
11 technology-assisted review essentially allows you to stop  
12 looking at documents before you --

13 THE COURT: No, I get what TAR is; I want to know  
14 what you mean by linear.

15 MS. MAURER: Okay. A linear review means you're not  
16 using TAR; you're looking at every single document. So if we  
17 have a million documents, it means you're looking at a million  
18 documents.

19 THE COURT: But you're saying that there are studies  
20 that say when a person is actually looking at everything,  
21 they're catching less than the TAR does?

22 MS. MAURER: Correct, your Honor.

23 THE COURT: Yikes. That's why I --

24 MR. GILBERT: Your Honor, can I speak to that?

25 THE COURT: Sure. Go ahead.

1                   MR. GILBERT: We find it ironic that institutions of  
2 higher education find 70 percent a success rate because every  
3 student who got 70 percent would be a horrible student or  
4 would be failing.

5                   THE COURT: Well, it depends on what kind of curve  
6 they grade on. I don't know.

7                   MR. GILBERT: There you go. There you go. This is a  
8 pretty steep curve in their favor, okay, 30 percent false  
9 negatives. But in addition to that, they want to compound the  
10 false negatives in the search terms. So now, there's like a  
11 double whammy on the plaintiffs of false negatives.

12                  We don't think that's appropriate, your Honor, and  
13 it's not necessary. And by the way, we find it really  
14 difficult to listen all the time to how many millions of  
15 documents they have to look at because that -- we gave them  
16 623 names more than five months ago on donation records.  
17 Here's the name of the donor, we believe there's a substantial  
18 basis they gave more than \$50,000, and that we gave the name  
19 of the donor and the name of the student admitted. Okay?

20                  They've all, except Cal Tech, refused to look at 623  
21 documents, yet they scream "Millions of documents" if they  
22 have to try to get it right in looking for documents in this  
23 case. We don't think that's an appropriate line of argument,  
24 and we think 85 percent is -- having 15 percent false  
25 negatives is a sufficient number of false negatives, and we

1 certainly don't think that we should compound the false  
2 negatives by adding search terms on top of TAR. It should be  
3 85 percent TAR, or it should be the search terms, but not both  
4 making each worse than the other.

5 THE COURT: So if you -- I have a question about the  
6 first part, but I'm going to do that second.

7 When you say the search terms on top of TAR, what  
8 you're basically telling me I think, and I just want to make  
9 sure I'm understanding it right, is that 70 percent ends up  
10 actually being less than 70 percent because of -- you're  
11 basically compounding things that are going to have false  
12 negatives.

13 MR. GILBERT: That's exactly right. There's one set  
14 of false negatives, and then there's a second level of false  
15 negatives, okay? And so one makes the other worse than the  
16 one before.

17 THE COURT: Can I go back to the other thing you  
18 mentioned, the thing about the 60 -- however many it was -- or  
19 600 names or whatever it was?

20 MR. GILBERT: Yes.

21 THE COURT: And, again, I apologize for asking  
22 questions that make it appear that I do not understand what  
23 you're talking about because I understand, I think, about  
24 70 percent or maybe it's 85 percent.

25 MR. GILBERT: I think I'd assume more than

1 85 percent, your Honor.

2 THE COURT: By the way, that's a TAR joke.

3 MR. GILBERT: Okay. I get it. I get it.

4 THE COURT: It's Volume 1 of 1 of all TAR jokes.

5 MR. GILBERT: Okay. Got it.

6 THE COURT: So is that a -- looking at the 620 names,  
7 or whatever it was, is that a separate issue from the TAR or  
8 is that part of the TAR stuff?

9 MR. GILBERT: I think it's part of the way they're  
10 being serious about searching or not searching. I mean --

11 THE COURT: So let me tell you where I'm going with  
12 this because, I mean, I get what you're saying when you say,  
13 "Okay. We asked University A to look at -- to look up records  
14 regarding 50 people, and we shouldn't" -- and if the records  
15 relating to those 50 people is part of the whole ESI and TAR  
16 review, then I guess I might say, "Well, why do we have to  
17 apply the same TAR percentages to everything?" But if that's  
18 a separate thing, then that's a -- my point is kind of  
19 worthless.

20 MR. GILBERT: Well, I think it's -- they're certainly  
21 related points, okay? I mean, they're not going to look at --  
22 I think it goes to the pattern of trying to obfuscate with  
23 claims that there's going to be millions of documents  
24 involved, okay, and that they should be allowed to make  
25 30 percent mistakes that are compounded by other mistakes.

1 They have something that's been sitting in front of them for  
2 five months, and they've failed to look at it, except for Cal  
3 Tech.

4 MS. MAURER: Your Honor, may I respond to that?

5 So a couple points:

6 First of all, there are separate categories of  
7 documents that, speaking for Georgetown, we have agreed to go  
8 get, meaning they're separate from our TAR review. We're  
9 targeting, you know, targeted searches of documents that  
10 plaintiffs have requested that are not part of our TAR review.  
11 I cannot respond directly to the 635 documents. I'm not  
12 entirely sure what that relates to, but there are separate  
13 categories of documents that are separate from our TAR review.

14 Second of all, when we're talking about the numbers  
15 of documents, these are -- you know, these are in response to  
16 the hundred RFPs that plaintiffs have propounded, and these  
17 are actual numbers based on the collections that we've done to  
18 date. So for Georgetown, it's 4.7 million documents that  
19 would go --

20 THE COURT: Honestly, I wasn't doubting you on that.

21 MS. MAURER: Okay.

22 THE COURT: I mean, I know it's a big case. I know  
23 there's a lot of records. So, I mean, whether it's a million  
24 two versus a million three, okay, but I wasn't doubting you on  
25 that, so you don't need to worry about that.

1           Okay. So let me just kind of -- play out the  
2 string here a little bit. So let's say that today I give you  
3 a -- I answer both of these questions, so I give you the  
4 percentage on the target recall rate, and I say yes or no  
5 whether the search terms are applied before you do the TAR.

6           And I know you can only speak for yourself, but  
7 that's a reasonably random sample, I guess. So how soon is  
8 stuff going to start actually getting produced? And I  
9 recognize that you then -- that somebody's going to have to  
10 review stuff, but can you kind of give me the time frame?

11           MS. MAURER: So for Georgetown, we've already started  
12 rolling productions. We've made three rolling productions to  
13 date. We have another production of about 14,000 documents  
14 planned for tomorrow. We have another production obviously  
15 planned for March 3rd.

16           THE COURT: That can't be the stuff that we're  
17 talking about now as it relates to TAR, right?

18           MS. MAURER: No, that's the stuff that's already in  
19 our review.

20           THE COURT: I'm talking about the stuff that we're  
21 dealing with in this target recall rate-type thing.

22           MS. MAURER: So in terms of --

23           THE COURT: If I decide both of those issues today  
24 and you're good to go, how long is it going to take to get  
25 that stuff produced?

1           MS. MAURER: It's going to add a significant amount  
2 of time to our review, to be quite frank. We have to add  
3 3 million documents into our review.

4           THE COURT: Does that mean a week? a month? a year?

5           MS. MAURER: For Georgetown, I would expect in order  
6 to finish the first-level review if we need to add multiple  
7 millions of documents it would take us approximately three  
8 months. Now we could make rolling productions, your Honor --

9           THE COURT: Yeah, of course.

10          MS. MAURER: -- but I think it would take months.

11          THE COURT: Okay. Anything else anybody wants to say  
12 about this that you haven't already said?

13          Okay. I'll take that as a no. I'm going to pause  
14 that for a second, and we're going to talk about the other  
15 thing.

16          The other thing has to do with -- I'm looking at  
17 February 10th, Joint Status Report, page 3, Item Number 2 at  
18 the top of page 3, whether defendants should produce  
19 structured data concerning defendants' admission decisions  
20 through the end of this calendar year; in other words, through  
21 the end of 2023. Plaintiffs have asked defendants to do so.

22          So I gather that the defendants haven't agreed to  
23 that or at least all the defendants haven't agreed to that.

24          So who's going to talk about that?

25          Somebody else just appeared. You're muted.

1                   MR. RYBNICEK: Good morning, your Honor. Jan  
2 Rybnicek, counsel for MIT, speaking on behalf of defendants.

3                   THE COURT: Okay.

4                   MR. RYBNICEK: This issue relates to discovery of  
5 materials created after January 9th, 2022, the filing of the  
6 complaint. We have -- defendants have agreed to produce  
7 several types of materials created during that time. One  
8 issue that remains in dispute is the production of financial  
9 aid data. We are proposing to provide updated financial aid  
10 data in October 2023 that will give completed financial aid  
11 data through the most recent calendar year or the most recent  
12 school year.

13                  Plaintiffs are asking for us to produce data and  
14 collect data in December, at the end of December 2023, which  
15 is in the middle of the admissions cycle. It would be  
16 incomplete, subject to change, and it would obviously create a  
17 significant burden on the --

18                  THE COURT: Pause for a second.

19                  So the dispute, it sounds like, has to do with  
20 whether -- putting aside this collection date thing, whether  
21 the data concerns -- goes up through the 2022/2023 school year  
22 or whether it effectively goes into the following school year.

23                  Am I getting you right?

24                  MR. RYBNICEK: That's correct, your Honor.

25                  THE COURT: Okay. All right. So finish your point.

1 I cut you off in the middle. I just wanted to make sure I was  
2 getting it.

3 MR. RYBNICEK: The only thing I was going to add was  
4 that this obviously creates a burden because the staff that  
5 would be required to pull that data would be in the middle of  
6 the busiest time of the year, making the financial aid  
7 determinations for the next admissions cycle.

8 THE COURT: Okay. Mr. Gilbert, go ahead on that one.

9 MR. GILBERT: Your Honor, this is a very narrow  
10 issue. We have -- our experts have advised us that it's  
11 important to have at least two sets of data following the  
12 ostensible dissolution of the conspiracy on November 4th --

13 THE COURT: So they need the after to compare it to  
14 the before.

15 MR. GILBERT: Exactly. And so in order to --

16 THE COURT: They're telling you they don't want just  
17 one year; they want two years.

18 MR. GILBERT: They don't want just one cycle; they  
19 want at least the beginning of the next cycle as to what  
20 happened, right, because it would go to a lot of proofs if  
21 they -- and we haven't requested that the data be produced to  
22 us by December 31st; we requested that it be by February 15th  
23 of 2024.

24 The burden is really on our experts who then have to  
25 produce their final expert report by March 15th, within one

1 month, so the burden is on them. It's not on the people who  
2 get two months to provide the data.

3 And the argument -- the only argument that we've  
4 heard is that, "Well, they're busy." Well, we've given them  
5 until February 15th. Our experts are busy too.

6 THE COURT: Can I ask a question in terms of the data  
7 because your status report refers to this as structured data?  
8 What exactly does that mean?

9 MR. GILBERT: Structured data and I'm not a stat  
10 person myself --

11 THE COURT: Is it --

12 MR. GILBERT: -- but it's quantitative data, okay?  
13 And it goes to both the admissions and to the financial aid,  
14 okay? It's the quantitative data. What was the size of the  
15 awards? How many awards were given? How many students were  
16 admitted from a social-economic group? That kind of data,  
17 that's the structured data.

18 THE COURT: Okay. If I can ask Mr. -- I'm going to  
19 botch your name -- Rybnicek --

20 MR. RYBNICEK: Perfect.

21 THE COURT: Okay.

22 -- this question: So when somebody is pulling this  
23 structured data, I assume that what has to happen, and  
24 probably you've done this for past years already, is that  
25 somebody has to create some sort of a -- it's not a computer

1 program, that's the wrong word, they're going to have to  
2 create some sort of a script, in other words, to extract the  
3 relevant data from all of the stuff that you've got and spit  
4 it out in the form that's being asked for. Is that pretty  
5 much right?

6 MR. RYBNICEK: That's pretty much right, and there  
7 are multiple tables that need to be collected, and then they  
8 need to be anonymized to abide by --

9 THE COURT: Oh, of course. Right, right.

10 So one of the things that Mr. Gilbert said is they  
11 aren't actually asking for this in December; they're asking  
12 for it in February of next year.

13 MR. RYBNICEK: I understood that they are asking for  
14 us to pull it no earlier than December 31st and produce it  
15 within 45 days.

16 THE COURT: Okay. What's the date -- what's the date  
17 for the plaintiffs' expert disclosures?

18 MR. GILBERT: March 15th is when the experts have to  
19 release their report.

20 THE COURT: Of 2024?

21 MR. GILBERT: Of 2024.

22 THE COURT: Yeah. Okay.

23 MR. RYBNICEK: Your Honor, our argument is not just  
24 about burden. It's also about the data will be incomplete and  
25 tentative at best. Many schools will not have made a

1 significant portion of their financial aid determinations by  
2 the end of December; for example, MIT doesn't make its  
3 determinations until mid-January. So there are only so many  
4 determinations that are made in December, and many of those  
5 are subject to appeal and revision.

6 THE COURT: So let me go back to Mr. Gilbert on that.  
7 And what you say makes sense to me just based on my own  
8 increasingly old anecdotal experience from when I had to deal  
9 with this stuff on my kids. You know, some people get their  
10 packages put together fairly early in the process, some come  
11 later on, and not everybody has everything put together by the  
12 end of December.

13 So, Mr. Gilbert, what that means, and I guess it's  
14 kind of inherent in the enterprise, if you will, given the due  
15 date for the experts' reports, that you're likely to face a  
16 situation where you're not going to have full data for that  
17 particular school year when you get that production in January  
18 or February of 2024.

19 MR. GILBERT: Well, going back to your Honor's point  
20 about negotiating about the shape of the table. Weeks ago, we  
21 asked to substantiate that point and give us just a one-page  
22 chart which universities of the 17 cannot -- do not make those  
23 determinations until January, okay? We expressly asked for  
24 that in a meet and confer. We were expressly told, "We'll  
25 take it under advisement." We pretty much responded, "You

1 have to be kidding." I mean, this is a one-page chart that an  
2 associate or a paralegal could put together in half a day at  
3 most. And they've still refused to produce that to  
4 substantiate this point. So if they refuse to substantiate  
5 this point --

6 THE COURT: Okay.

7 MR. GILBERT: -- that's exactly the argument.

8 THE COURT: Let's just kind of war game this out  
9 here. Let's say I tell them to give you that chart by like  
10 next Tuesday, and it substantiates at least for some  
11 significant number of schools the point that they are making  
12 now? So now we're back to my question. You're going to be  
13 getting -- what would you do at that point, then, now that you  
14 know that you're going to be getting at least for some schools  
15 not fully 100 percent complete data for that particular school  
16 year?

17 MR. GILBERT: I know that the experts' general  
18 response is more data is better than less data.

19 THE COURT: More data --

20 MR. GILBERT: And we have to see exactly what this  
21 chart shows, and we've been asking for it for weeks.

22 THE COURT: Okay. All right. Okay. So here's what  
23 we're going to do on that. I'm going to put short time frames  
24 on this. And I know that we're talking about a decision  
25 that -- we're talking about production that isn't going to be

1 made for months. I'm hoping to kind of put issues to bed  
2 here. This one we're not going to fully put in bed; we're  
3 kind of starting to tuck it in, if you will.

4 So by next Tuesday, just to pull a date out of the  
5 air, that's the -- what is that, the 28th? -- the 28th of  
6 February, the defendants are to produce to Mr. Gilbert the  
7 chart that he's talking about regarding the timing of  
8 financial aid decisions for the -- not for the current school  
9 year, but for what's anticipated for the 2023/24 admissions  
10 cycle. And I'm probably using the wrong lingo, but you know  
11 what I mean, okay?

12 My inclination is to require the defendants to  
13 produce that data as long as the deadline isn't, you know, in  
14 January, and as long as the deadline is in February, it needs  
15 to be enough before the plaintiffs' expert disclosure date to  
16 give them sufficient time to assess it, but I think you can  
17 take the comments that I'm making and kind of where I'm  
18 leading it and work something out, so that's what I'm going to  
19 ask you to do.

20 I'm going to ask you to file a status report on that  
21 then by the 6th of March, which is the following Monday, just  
22 addressing this one issue which I'm calling the 2023/24  
23 admission data issue, okay?

24 On the --

25 MR. RYBNICEK: A point of clarification, your Honor,

1 it's financial aid data.

2 THE COURT: That's what I meant.

3 MR. GILBERT: I'm sorry, your Honor --

4 THE COURT: It's both, right? It's both. It's both,  
5 yeah, because financial aid kind of travels as a team with  
6 admissions except for some people. Anyway, so that's that  
7 one.

8 Going back to the TAR issue, you know, as you were  
9 talking, I, quite honestly, contemplated for a couple of  
10 nanoseconds saying "Let me see these cases that you're talking  
11 about which talk about, you know, what's the right  
12 percentage." I've been at this long enough to know that  
13 there's a decent amount of pulling things out of the air  
14 that's happening, and those things are likely to be, so I  
15 don't think that's a -- that's kind of a waste of time.

16 So understanding that there are no perfect solutions  
17 to problems, I'm going to go with the defendants' position on  
18 the question of -- I want to make sure that I state the  
19 question correctly -- on whether -- pardon me -- on the issue  
20 of applying search terms before applying the TAR methods.

21 And on the other issue which is the target recall  
22 rate, I'm going to make it 75 percent which is a little higher  
23 than what the plaintiffs asked for and somewhat lower than  
24 what the defendants asked for. I'm sorry. I got that  
25 backwards. Somewhat lower than what the plaintiffs asked for

1 and a little bit higher than what the defendants asked for.

2 So there you go.

3 MR. RYBNICEK: Your Honor, there are two other  
4 issues. And apologies if this wasn't clear. There are two  
5 other issues related to post-complaint discovery, if I could  
6 just quickly address those?

7 THE COURT: Okay. I don't know. Can you just  
8 quickly address them?

9 MR. RYBNICEK: I will try to as quickly as possible.  
10 The first we have already dealt with is financial aid, the  
11 other two are related to financial aid documents, and the  
12 third is related to admissions documents.

13 So plaintiffs have said that they want to see our  
14 practices after our financial -- our financial aid practices  
15 after the expiration of Section 568 and the dissolution of the  
16 568 Group. Defendants have said that they're willing to  
17 produce financial aid documents.

18 What we're proposing is providing updated versions of  
19 our financial aid handbooks, guidelines, training materials  
20 that show how we determine financial aid awards after the  
21 expiration of the 568 Group that we can --

22 THE COURT: As opposed to what?

23 MR. RYBNICEK: As opposed to doing a broad collection  
24 and search of all documents.

25 THE COURT: So is that the first issue, or is that

1 both of the issues?

2 MR. RYBNICEK: That is the first issue, your Honor.

3 THE COURT: Tell me what the second issue is.

4 MR. RYBNICEK: The second issue is that plaintiffs  
5 have asked for admissions documents for the post-complaint  
6 period. And the defendants that are asserting the 568  
7 exemption are already producing, as you know, many years of  
8 admissions documents, and those are the appropriate and  
9 logical place for plaintiffs to start. And for similar  
10 reasons as your earlier ruling, your Honor, we don't think  
11 that post-complaint admissions documents are relevant or  
12 necessary to produce here.

13 THE COURT: So I'm going to anticipate Mr. Gilbert's  
14 argument or at least part of it and ask you to respond to it.  
15 So my expectation is that Mr. Gilbert is going to say:

16 How can you -- how can we see what the effect of the  
17 alleged conspiracy was or the 568 exemption unless we see how  
18 and to what extent things changed after either people withdrew  
19 from the group or the exemption expired?

20 And if you don't provide the data, and not just the  
21 manuals, but the data for that after period, that then the  
22 experts, and ultimately me or the jury, doesn't have anything  
23 relevant to compare it to.

24 So how would you respond to that?

25 MR. RYBNICEK: We don't disagree with that, your

1 Honor. That is why we have offered to provide handbooks  
2 related to the financial aid determinations. Remember, this  
3 is an alleged financial aid conspiracy, and admissions  
4 materials are only relevant because of the 568 exemption, and  
5 we have -- and there's no other relevance to those materials.

6 MR. GILBERT: Your Honor, may I address that?

7 THE COURT: Hang on a second. Let me just -- I just  
8 want to push back a little bit.

9 And, again, maybe I'm anticipating something  
10 Mr. Gilbert would be saying, but, I mean, I guess as a -- you  
11 know, as a professional skeptic, what I would probably say on  
12 that is "It's all well and good what's in the manuals, but we  
13 want to actually see how it actually works in the field."

14 So what about that?

15 I mean, I don't know how this stuff works in  
16 practice, but, you know, if what you're telling me is that the  
17 folks in the admissions office and the financial aid office  
18 are a bunch of automatons that basically just apply the manual  
19 and it gets spit out, then, okay, that's what you're telling  
20 me, but I'm guessing that you wouldn't tell me that.

21 MR. RYBNICEK: No, your Honor, but we think that the  
22 manuals and handbooks and trading guides by which they make  
23 these determinations are the most relevant piece of evidence  
24 or at least the evidence or materials that are most responsive  
25 to the request here.

1                   THE COURT: Okay. Mr. Gilbert?

2                   MR. GILBERT: First let me clarify a couple of things  
3 about the issues on the table and then address these -- the  
4 documents that we're talking about in terms of admissions and  
5 financial aid policies.

6                   What both parties or all parties have been using --  
7 we're using the phrase "structured data" -- it's quantitative  
8 things about admissions and financial aid. And we understand  
9 your Honor just ruled on what has to happen about that, about  
10 a chart on next Tuesday, et cetera.

11                  THE COURT: Yeah.

12                  MR. GILBERT: Okay. The other thing is documents,  
13 not data. Documents go to financial aid policies and  
14 admissions policies. We have -- and practices, how they've  
15 changed their practices or didn't change their practices. We  
16 have given the defendants multiple times at least six reasons  
17 why this is relevant, and we've cited cases. They have not  
18 rebutted any of those cases.

19                  THE COURT: Right.

20                  MR. GILBERT: None. The reasons include, first,  
21 causation which your Honor was getting at; in other words, if  
22 they changed the policies and the price went down after they  
23 dissolved the conspiracy, that would strongly be evidence of  
24 the cartel was raising the price.

25                  Another is whether these are revenue-maximizing

1 entities which would trigger the per se rule rather than the  
2 rule of reason.

3 Another reason is it can be used to rebut  
4 justifications that, "Well, it was never feasible due to  
5 something other than have a cartel."

6 Another reason was admission, rather, impeachment.

7 Another is internal admissions that -- what they had  
8 been doing in the past; an email that says, "Henceforth, we  
9 will no longer be made aware as to transfer students" -- says  
10 what they were doing as to transfer students when the cartel  
11 existed.

12 And it could be used as evidence against other  
13 defendants who did not change their policies after the  
14 dissolution of the cartel.

15 So for all those reasons, we've identified case law.  
16 They haven't rebutted a single one. It's obviously relevant  
17 evidence, your Honor, in multiple ways, and it should be  
18 produced as to the policies and practices of financial aid and  
19 admissions.

20 THE COURT: Okay. Mr. Rybnicek?

21 MR. RYBNICEK: Your Honor, we don't dispute that  
22 there are -- we understand why the plaintiffs want financial  
23 aid material, data and documents for the pre- and post-568  
24 period: Obviously, to compare what had happened before and  
25 after. And that is why we have readily offered to produce the

1 data and as well as the policies and practices.

2 The admissions materials is only relevant for the 568  
3 exemption, and that is a binary --

4 THE COURT: See, that's the part I'm not getting.  
5 I'm not understanding why that's the case. I mean, I -- and  
6 maybe I'm just naive, but it just seems to me that the two, I  
7 think I said before, travel as a team. Maybe that's a bit of  
8 an overstatement, but there's linkage between the two as it  
9 relates to the claims that are made in this case.

10 MR. GILBERT: Your Honor, if I may --

11 THE COURT: No, I'm with Mr. Rybnicek right now.

12 That's what I'm not understanding in your response.  
13 I don't understand how you can de-link them.

14 MR. RYBNICEK: Well, the financial -- again, the  
15 plaintiffs are alleging a financial aid conspiracy and whether  
16 or not an alleged collusion changed the amount of financial  
17 aid that is provided to students. Admissions materials -- and  
18 in particular what they're seeking is materials that suggest  
19 that the defendants are not need-blind so that they cannot  
20 assert a 568 exemption. Admissions materials --

21 THE COURT: And so what you're telling me -- what  
22 you're telling me is that once the exemption has expired or  
23 it's no longer being asserted, the question of whether  
24 admissions are need-blind doesn't matter anymore. That's what  
25 I just got from what you said.

1                   Did I get it right?

2                   MR. RYBNICEK: Yes. Yes, your Honor. As well as  
3 there are already many, many years of admissions documents  
4 that we are producing during the period we're asserting the  
5 exemption, the defendants that are asserting the exemption,  
6 and adding additional documents.

7                   THE COURT: Mr. Gilbert?

8                   MR. GILBERT: Your Honor, may I respond?

9                   THE COURT: It's got to be short, but, yes, go ahead.

10                  MR. GILBERT: We believe your Honor has ruled on this  
11 multiple times, okay, that the admissions goes to issues  
12 beyond just the exemption, okay? We've talked about that the  
13 last time your Honor ruled on it, okay, and you ruled on it  
14 last August 15th; that is, it goes to statute of limitations  
15 issues, okay, whether or not they were -- what they were doing  
16 they were concealing, okay? We have to have -- be able to get  
17 an opportunity to take discovery on that. It goes, as I  
18 said --

19                  THE COURT: Stop. All right. I've made up my mind  
20 on this.

21                  I think the plaintiffs have the better of this  
22 argument. I think the admissions data is relevant, and I  
23 don't think it's disproportionate, and I think that the --  
24 just producing the manuals, as was suggested, isn't --  
25 doesn't -- it falls short of providing relevant and reasonably

1 proportional materials. So that's the ruling on that.

2 So here's what I need you to do. The thing I talked  
3 about as the first issue, the reason we were even talking  
4 about it is I basically botched the language in the order when  
5 I said that the custodial documents from the president and  
6 development office is that the objecting defendants don't have  
7 to apply, and I meant everybody, so I botched it. So I'm not  
8 going to do that again.

9 Here's what I need you to do. I need a draft order  
10 from you all by Monday which embodies the rulings that I made  
11 here today. Don't try to change anything. I don't have to  
12 have a whole bunch of findings in there. It's just the bottom  
13 lines: This is what happens, this is when it happens, this is  
14 who does it, this is how much you got to do. Get me that.  
15 Hopefully, you'll be able to agree on the language. Send a  
16 Word version to my proposed order email address.

17 MR. GILBERT: Thank you, your Honor.

18 THE COURT: Okay. All right. I'm going to gird my  
19 loins before I ask this next question: Is there anything  
20 anybody else wants to talk about?

21 MR. GILBERT: We want to talk about when we're  
22 finally going to get a donation record. We haven't received  
23 one yet.

24 THE COURT: I had to ask the question. I had to ask  
25 the question. You know, the *New York Times* says that if you

1 ask a question in a video or a phone meeting and nobody  
2 answers for 7 seconds, that means nobody's going to. You got  
3 in at 6.8.

4 MR. GILBERT: All right.

5 THE COURT: All right. That's an issue for another  
6 -- for the next time.

7 So, look, again, folks, I mean, I don't expect that  
8 you're going to be able to, you know, look at the rulings that  
9 I've made on these discovery issues and come up with a  
10 pattern. And I acknowledge that this is a big and complicated  
11 case, and there's a lot of parties on both sides, and there's  
12 going to be problems. And I completely get that you've --  
13 there's all of this stuff that you've worked out that's  
14 completely under the -- you know, off of my radar screen, but  
15 I hope -- the goal is as we go on, the number of -- the curve  
16 on the issues that I have to decide is going south rather than  
17 north, so just do your best to work out what else you've got.

18 I think we've got another status hearing down the  
19 road, so I'm just going to table everything else until then  
20 unless there's something that comes up that I have to decide  
21 before then.

22 Everybody, take care. Thanks.

23 MR. GILBERT: Thank you, your Honor.

24 MR. RYBNICEK: Thank you, your Honor.

25 (Which were all the proceedings had in the above-entitled  
cause on the day and date aforesaid.)

1 I certify that the foregoing is a correct transcript from  
2 the record of proceedings in the above-entitled matter.

3 Carolyn R. Cox \_\_\_\_\_ Date  
4 Official Court Reporter  
Northern District of Illinois  
5 /s/Carolyn R. Cox, CSR, RPR, CRR, FCRR

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